The Corporate Counselor

- Insights into Japanese Corporate Law -

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JAPAN DOCUMENT EXECUTION AND RETENTION POLICIES IN THE ELECTRONIC AGE

How many originals should be executed and delivered? This question is frequently asked by Japanese companies when concluding a commercial agreement, and is often met with bewilderment by overseas counter-parties who have foregone reliance on manually executed original agreements in paper form. Despite operating in one of the most technologically advanced countries in the world, Japanese companies still often manually execute contracts by affixing a corporate seal (or less frequently, by placing a handwritten signature) to conclude an agreement, and keep a "wet" original. For companies that enter into numerous contracts, archiving and storing volumes of paper original agreements can quickly become an expensive proposition and can lead to innumerable tracking difficulties. The reliance on exchanging paper original agreements stems in part from the misconception that an original is always and inevitably required in Japanese dispute resolution proceedings to provide proof of the existence of a contract and to demonstrate the definitive terms of an arrangement.

This edition of the *Corporate Counselor* seeks to dispel the belief that parties must at all times execute and maintain paper original agreements in order preserve their ability to engage in Japanese dispute resolution proceedings if there is a dispute between the parties. Besides originals, contracts executed by e-signature or otherwise electronically exchanged are admissible as evidence to demonstrate a manifestation of intent. Nonetheless, there are traps for the unwary when formulating a document execution and retention policy for commercial agreements. This newsletter highlights the issues to consider when executing an agreement by e-signature or through the exchange of digital scans (such as PDF) and possible mitigation steps, and culminates with a discussion regarding when an original document should be maintained.

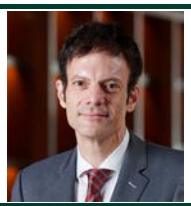
Document Execution Policies

Japan recognized e-signatures as a valid legal form of signature under the Act on Electronic Signatures and Certification Business, which came into effect on April 1, 2001. Even though it has been over 20 years since Japan's e-signature legislation became effective, corporate Japan has not widely embraced the practice of executing contracts by e-signature and continues to rely on sealing/signing and exchanging paper original agreements. Such reliance is based in part on the misconception that an e-signature has dubious legal effect. If an agreement is properly executed by e-signature, then the electronically signed document is considered the same as an original. Accordingly, there should be no dispute as to authenticity and an electronically signed document can be submitted as evidence in Japanese dispute resolution proceedings.

To help foster the adoption of e-signatures (especially with the COVID-19 pandemic backdrop that led many companies to adopt remote work requirements and restrict face-to-face meetings/signing ceremonies), the Japanese government announced in September 2020 its opinion that the most common e-signature methods available in Japan create a valid legal form of signature, and subsequently proposed regulatory reforms to abolish the need to affix a corporate seal on numerous administrative procedures.

Despite their ease of use, e-signatures are not a panacea, and parties conducting business in Japan should take the following precautions:

- ***Suitable program***. Despite the recent Japanese government announcement, not all e-signature programs comply with Japan's e-signature legislation, which requirements are complex, difficult to comprehend and vary if a cloud-based service provider is used. If there is any question as to whether the e-signature is valid, then the judge may initiate a fact-finding hearing, as not all agreements need to be signed or converted into a written instrument in order to be valid and binding under Japanese law. Therefore, a review of the applicable program against Japanese statutory requirements is indispensable before proceeding with an e-signature exchange in Japan, which review legal counsel can support.



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- ***Authority***. Generally speaking, the Representative Director of a company is authorized to execute contracts on behalf of the company. Depending on the frequency with which the company enters into contracts, the Representative Director may delegate signing authority to other persons within the organization for specified contracts or contracts up to a certain value. Therefore, a counter-party should continue to confirm that the e-signer has authority to bind the company since the delivery of an e-signature itself does not provide the presumption of due authorization.

- ***Compatibility***. Legally compliant e-signature programs vary by feature and sophistication. The parties should decide upfront which program(s) will be used to avoid software conflicts. Moreover, given the current relative infrequent usage of e-signatures in Japan, convincing the transaction parties to exchange e-signatures may require pain-staking efforts (so this execution process should be raised at an early stage in the transaction).

- ***Cross-border compliance.*** Not all countries recognize the validity of e-signatures. For contracts that will be executed by parties inside and outside of Japan, e-signature legislation should be confirmed and harmonized to avoid conflicts.

- ***Release of e-signatures.*** Certain contracts are intended to become effective upon the completion of specified events (e.g., closing conditions in an M&A contract). Such contracts are frequently executed in advance and held by legal counsel for release upon the satisfaction of the enumerated conditions precedent. Care should be taken, therefore, to use a legally compliant e-signature program that also can achieve a timely delivery of executed agreements only upon the achievement of stipulated conditions.

Although executing by e-signature is convenient and especially helpful if the signatories do not have access to a printer/scanner, pending a further impetus from the Japanese government to use e-signatures, it is unclear whether the Japanese business community will be self-motivated to more fully adopt an e-signature approach to executing agreements.

Document Retention Policies

Executing an agreement by affixing the corporate seal or handwriting a signature is still considered by many as easier and a more reliable method to demonstrate a manifestation of intent by the parties and to preserve dispute resolution rights. Due to difficulties with meeting in person, parties frequently exchange executed agreements through digital scans attached to emails, with paper originals physically mailed subsequently to serve as the definitive evidence of the agreement. If a manually executed version has been electronically shared, this poses the question of whether mailing and maintaining the paper original is still necessary?

Article 143 (Method of Submission, etc. of Document) of Japan's Rules of Civil Procedure states:

(1) When submitting or sending a document, the original, an authenticated copy or a certified transcript of the document shall be submitted or sent.

(2) Notwithstanding the preceding paragraph, the court may order the submission of the original or sending of the original.

Therefore, the default rule in Japanese civil procedure technically still requires the parties to furnish the court with the original of a contract that will be submitted into evidence, and the absence of an original could provide a wily party with leverage to attack the authenticity of a copy.

Despite the provisions of Article 143, Japanese courts normally do not automatically insist that an original of an agreement (as opposed to a copy) be produced. In practice, when a written agreement is submitted into evidence in a litigation, the submitting party files a copy of the agreement with the court and also sends a copy to the other party to the litigation. The original of the agreement is subsequently brought to the hearing to allow the judge and the other party to the litigation to compare the original against the copy filed with the court. If there is no dispute as to the existence of the definitive authentic version of the agreement (which is frequently the case), then the showcasing of the original agreement will be skipped and the judge will directly move to the review stage over the subject agreement. In international commercial arbitrations, including those seated in Japan, the parties are normally more relaxed about requiring the confirmation of original copies of agreements if authenticity is not an issue (which is often the case too). If there a discrepancy between the copy and the original, then the judge may initiate a fact-finding hearing.

Not having to physically warehouse numerous commercial agreements can result in tremendous savings to a party that outweigh the potential risk that a dispute will arise as to the authenticity of an electronically stored agreement. However, since this risk cannot be eliminated, a party electing to electronically store manually executed documents and not maintain the originals should consider adopting the following practices to further minimize the fruition of an authenticity challenge:

- Negotiate into the agreement a clause that permits an exchange by email of signature counterparts, such as "*this agreement may be executed by the parties in multiple counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same instrument; signatures to this agreement transmitted by email in "portable document format" (".pdf") or by any other electronic means intended to preserve the original graphic and pictorial appearance of this agreement shall have the same effect as physical delivery of the paper document bearing an original signature*."

- Maintain all major correspondence (e.g., e-mails or meeting minutes) with the counter-party regarding the negotiation of the agreement, especially the email delivering the fully executed version of the agreement to the parties (as such email will serve as useful evidence).

- Track the performance and observation of the agreement, as it should be an uphill battle for the counter-party to dispute the agreement's existence or validity if its terms have been observed (e.g., punctual full payments have been made and accepted).

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Contracting parties can realize various benefits by executing agreements by e-signature or electronically storing a manually executed version. Of course, companies may be hesitant to immediately make comprehensive changes to their document execution and retention policies. If a company wishes to convert, it may be prudent to first begin with certain categories of commercial agreements that are subject to a lower level of legal risk, such as contracts with counter-parties with which the company has a long-standing relationship of trust, boilerplate agreements that are not heavily negotiated, agreements that have a short duration, or agreements with a low contract amount or value.

A document execution and retention policy also should take into account that there are several types of agreements that require a "wet" signature under Japanese law. For example, powers of attorney, certain documents that will be submitted to the local commercial registry, notarial deeds, and fixed-term land/building lease agreements must be manually executed and an original preserved. Furthermore, companies operating in certain regulated industries may be required by agency rules to maintain original agreements for inspection by the regulator. Accordingly, legal counsel should be consulted if there is doubt as to whether an arrangement requires special procedures to preserve its authentication and enforcement rights under Japanese law or to comply with regulatory requirements.

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